No. 13138

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

vs.

PAT DUBY, doing business as Pat Duby Company, and Continental Casualty Company, a corporation,
Appellees.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLANT

J. CHARLES DENNIS
United States Attorney

JOHN E. BELCHER
Assistant United States Attorney

OFFICE AND POST OFFICE ADDRESS:
1017 U. S. COURT HOUSE
SEATTLE 4, WASHINGTON

BALLARD NEWS, SEATTLE, WASHINGTON -- 2/5/52 -- 45 COPIES

No. 13138

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

vs.

PAT DUBY, doing business as Pat Duby Company, and Continental Casualty Company, a corporation,
Appellees.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLANT

J. CHARLES DENNIS
United States Attorney

JOHN E. BELCHER
Assistant United States Attorney

OFFICE AND POST OFFICE ADDRESS:
1017 U. S. COURT HOUSE
SEATTLE 4, WASHINGTON

BALLARD NEWS, SEATTLE, WASHINGTON -- 2/5/52 -- 45 COPIES

INDEX

CASES CITED

STATUTES

MISCELLANEOUS

MOTION TO DISMISS APPEAL AS TO PAT DUBY COMPANY

Appellant moves to dismiss the appeal herein as to Pat Duby, doing business as Pat Duby Company, for the reason and upon the ground that the only relief herein sought is against the surety on its performance bond, the said Duby having been discharged in bankruptcy.

J. CHARLES DENNIS
United States Attorney
JOHN E. BELCHER
Assistant United States Attorney

No. 13138

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

vs.

PAT DUBY, doing business as Pat Duby Company, and Continental Casualty Company, a corporation,
Appellees.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLANT

JURISDICTION

The jurisdiction of the District Court is conferred by Section 1345, Title 28, U.S.C., and of this Court by Sec. 1291, Title 28, U.S.C.

STATEMENT OF THE CASE

The action was one for the recovery of liquidated damages as agreed to in a written contract between Civil Aeronautics Authority and Pat Duby Company for delay in the completion of the construction of concrete check dams and a twin concrete box culvert at the Seattle-Tacoma Airport in 1944. (Ex. 3)

Duby was awarded the contract on competitive bidding for the sum of $6,602.70.

By the terms of the contract, work was to be commenced within five days after notice to proceed, which was given October 6, 1944. (Ex. 5)

The work was to be completed in thirty days, but the time was extended an additional sixteen days. The work consumed a total of one hundred seventy-nine days, or one hundred thirty-three days in excess of the time fixed in the contract, the date of completion being April 2, 1945.

The terms of the proposal (Ex. 1) numbered 7-45-109 per H. inter alia provided:

> "LIQUIDATED DAMAGES: Subject to the provisions of Article 9 of the contract, the contractor shall be charged liquidated damages for each day of delay in completion of the schedule as follows:
>
> Schedule 1—$20.00 per calendar day."

Appellee Continental Casualty Company was surety on Duby's performance bond. (Ex. 3) In the final settlement with Duby the Government withheld the sum of $979.82.

At the rate agreed upon for liquidated damages for delay in completion, to wit: $20.00 per day for 133 days amounts to $2660.00. Deducting the amount withheld in final settlement, leaves a balance of $1680.18, which is the amount sued for.

Article 9 of the contract (Ex. 3) referred to in the proposal (Ex. 1) reads:

> "*Delays, damages.* If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in Article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event, the Government may take over the work and prosecute the same to completion, by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is terminated, the Government may take possession of and utilize in completing the work such materials, appliances and plant as may be on the site of the work and necessary therefor.
>
> "If the Government does not terminate the right of the contractor to proceed, the contractor

> shall continue the work, in which event it will be impossible to determine the actual damages for the delay and in lieu thereof, the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted, the amount set forth in the specifications or accompanying papers, and the contractor and his sureties shall be liable for the amount thereof * * *."

There is a proviso which relieves the contractor "due to unforeseen causes beyond the control and without the fault or negligence of the contractor including, but not restricted to acts of God, or the public enemy, acts of the Government, acts of another contractor, fires, floods and unusually severe weather."

There were no unforeseen causes beyond the control of the contractor. The contractor was negligent and incompetent.

Had the contractor acted diligently, he could have completed the work in the allotted time of forty-six days, which included the sixteen day extension, which would have expired in November, 1944, but because of his lack of diligence he ran into the usual rainy season so prevalent on Puget Sound, as so clearly shown by the progress he made in the first month of his work. There was nothing unusual about the weather, except that the rains naturally hampered

his work, which he did not complete until April, 1945.

Duby was thereafter adjudicated a bankrupt, having filed a voluntary petition therefor June 30, 1945.

The Government did not file a claim in the bankruptcy proceeding, but looked to the surety, Continental Casualty Company, on its performance bond. (R. 109-110)

After issue joined a trial was had in the District Court for the Western District of Washington, Northern Division, and resulted in findings of fact, conclusions of law and judgment in favor of Duby and his surety, Continental Casualty Company.

This appeal concerns only the judgment rendered in favor of Continental Casualty Company and no relief is herein sought against the judgment in favor of Duby.

THE EVIDENCE

The evidence in support of the complaint consists mainly of documents, to-wit:

Ex. 1 Call for bids. (R. 47)
" 2 Plans and specifications. (R. 48)
" 3 Contract. (R. 49)
" 4 Letter of April 4, 1945. (R. 50)

" 5 Letter of October 4, 1944. (R. 52-54)

" 6 Correspondence with surety. (R. 62)

" 7 Letter of August 11, 1945. (R. 63-68)

" 8 Certified copy of settlement. (R. 64, 68, 117)

" 9 Photostatic copy of letter of October 31, 1944. (R. 69-70)

" 10 Letter to Duby March 5, 1945. (R. 78-79)

" 11 Bankruptcy file Cause No. 37366. (R. 111)

" 12 Photostatic copy letter Oct. 4, 1944. (R. 112)

" 13 Photostatic copy of letter Jan. 16, 1945. (R. 113)

" 14 Photostatic copy of letter Jan. 29, 1945. (R. 113-114)

" 15 Photostatic copies of letters Feb., Mar., Apr. 1945 (R. 115)

" 16 Photostatic copy of letter May 10, 1945. (R. 115)

" 17 Photostatic copy of letter by Mr. Parrott. (R. 116)

" 18 Photostatic copy of letters affecting C.C.C. (R. 116-118)

The defendant Duby testified (R. 135) that he received a letter dated October 31, 1944, from Civil Aeronautics Authority complaining of the progress, in which the Authority said *"It is further pointed out that due to the nature of the work, its completion becomes increasingly difficult as the season advances,*

and that the Government's interest requires that construction *be completed at the earliest possible time.*"

At the conclusion of the evidence, the court took the matter under advisement, requesting briefs from all parties, which were supplied, and thereafter rendered its oral decision, carrying the same into its findings of fact, conclusions of law and judgment, which were entered July 16, 1951. (R 31-41)

Notice of appeal was timely filed and the matter comes before this court upon that appeal only in so far as Continental Casualty Company, the surety is concerned.

QUESTIONS ON APPEAL

We contend the District Court erred in the following particulars, to-wit:

I.

In adopting Finding XII to the effect that appellee Continental Casualty Company had no notice of appellant's claim for liquidated damages resulting from delay in the performance of the contract by said Duby until receipt of letter dated September 11, 1946, from the General Accounting Office of the United States.

II.

In adopting Conclusion of Law numbered IV holding appellee Continental Casualty Company entitled to a judgment of dismissal.

ARGUMENT AND AUTHORITIES

Finding XII reads:

> "That defendant, Continental Casualty Company, had no notice of plaintiff's intended claim for liquidated damages resulting from delay in the performance of the contract by said Duby until receipt of letter dated September 11, 1946, from the General Accounting Office of the United States and therefore the said Continental Casualty Company had no opportunity to file a claim covering the government's claim for liquidated damages in the H. L. Duby bankruptcy proceeding."

This particular finding is a mixed finding of fact and conclusion of law and is contrary to the evidence. Exhibit 6 (R. 62) consists of three letters, two of which are on the letterhead of appellee Continental Casualty Company dated in April, 1945, showing notice to appellee, contrary to Finding XII. Further, the appellee was, as surety, a party to the contract, Ex. 3, and had full knowledge of all of its provisions, including the provision for liquidated damages provided for in Article 9. One of the letters constituting Ex. 6 (dated in March, 1945), (R. 164). In response to a question on re-direct examination by its own counsel, the record at p. 164 shows the following in the examination of Mr. Bruce, who signed the performance bond:

BY MR. SKEEL:

"Q. As a matter of fact, in plaintiff's Exhibit 6, you requested the Government to withhold funds, did you not?

A. As early as March, 1945, because of understanding that the contractor was having difficulty in paying his bills, and *that he was going to be charged with liquidated damages, I requested that it be withheld.* The Government made no definite reply to that, but asked me why I wished to have it withheld, and I advised them in the letter which is in evidence, and gave them the bills which were outstanding, which were more than the amount of the bond, and they advised at the time that the contractor had made a request for additional compensation and the matter was being considered, and we had no thought at all that there was any chance of any liquidated damages being imposed upon him under those circumstances." (R. 65) (Italics ours)

Article 15 of the contract (Ex. 3) carries this provision:

"*Disputes.* Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shal diligently proceed with the work as directed."

The first real complaint made by Duby about the conditions existing at the site is contained in his letter to Doyle Affleck, Resident Engineer, dated January 16, 1945, (Ex. 13) (R. 113) more than two months after the time for completion of the work had expired. To which Mr. Affleck replied under date of January 22, 1945. (Ex. 14 - R. 113)

The decision of Mr. Affleck, under the terms of Article 15 of the contract (Ex. 3) became final and there is no evidence in the record that an appeal was taken by Duby to the Secretary of Commerce, so that that decision became final.

Exhibit 5 is a letter dated October 4, 1944, accepting Duby's bid of $6,512.70. With this letter there was transmitted in quadruplicate the formal contract (Ex. 3) as well as forms of performance and payment bonds, a complete set of drawings and specifications. The letter concludes:

> "You are hereby given notice to proceed effective October 6, 1944."

(This is duplicated by Ex. 12 which is a photostatic copy of the letter.)

Exhibit 6 consists of correspondence, the letters being dated March 6, 1945, from defendant Continentl Casualty Co. to the General Accounting Of-

fice requesting the withholding of further payments to Duby, April 23, 1945, from Continental to General Accounting Office, specifying certain debts and a letter from the General Accounting Office to Continental.

Exhibit 7 is a letter dated August 11, 1945, from Deputy Commissioner to the Regional Administrator.

Exhibit 8 is a certified copy of account with Duby showing the balance due from Duby (this was refused admission in evidence because photostat is on black background. We have offered a substitute on white background.)

Exhibit 9 is a letter to Duby dated Oct. 31, 1944, complaining of no progress and threatening to exercise the right to take over.

Exhibit 10 is a letter dated March 5, 1945, from Hall (Engineer on the job) to Duby.

Exhibit 11 is Duby's bankruptcy file No. 37366.

Exhibit 12 is a photostat of Ex. 5.

Exhibit 13 is Affleck's letter dated January 16, 1945, to Duby deciding as contracting officer the claim which Duby made.

Exhibit 14 is a letter from Duby to Affleck dated January 20, 1945.

Exhibit 15(a) to 15(b) and 15(c) are letters from Duby to Mr. Wilson, Administrative Officer, complaining of extra expense due to difficulties encountered.

Exhibit 16 is a letter dated May 10, 1945, addressed originally to Mr. Howard Clark in care of Senator Magnuson, but changed to D. J. Wilson, containing a resume of the complaints which did not commence until January, 1945.

Exhibit 17 is Mr. Parrott's letter to the General Accounting Office demand on Duby.

Exhibit 18(a), 18(b) are letters from Continental Casualty Co. to General Accounting Office, and General Accounting Office to Continental dated, respectively, April 23, 1945, and September 11, 1946; 18(c) is a letter dated October 9, 1946, from Continental to the General Accounting Office; 18(d) is a letter dated April 25, 1947, from the Comptroller General to Continental.

These exhibits were supplemented by oral testimony of Engineers Wild (R. 45, 96, 103) and Hall (R. 73, 167, 169)

Wild testified to the preparation of the plans

and specifications, while Hall testified to the actual conditions at the site of the job.

Duby testified in his own behalf and claimed unprecedented rains from the time of the commencement of the job, (R. 120, 134, 138, 150) the quicksand and gravel formation and that he was required to have a clam shovel on the job constantly. (R. 105)

In rebuttal, Hall (R. 169) testified that the rainy season did not commence until the time for completion had expired, and even then it was not unusual. The burden was on Duby and he did not produce any witnesses to bear him out.

The provisions of the contract providing as it does for "liquidated damages" of $20.00 per day for each day's delay in the completion of the project is definite and unambiguous and is binding on Duby and his surety.

The parties agreed in writing as to the amount per day Duby would be required to pay if there was delay and his surety can now be heard to say that plaintiff suffered no damages.

Six Companies v. Joint Highway Dist. No. 13, (9 Cir.) 110 F. (2d) 621;

United States v. Bethlehem Steel Co., 205 U.S. 105.

The case of *Rispin v. Midnight Oil Co.* (9 Cir.) 291 F. 481, which will undoubtedly be relied on by Continental, is hardly in point here for the reason that that was an action between private parties, while here, the public interest is involved, it was a public contract, and an entirely different rule obtains in such cases.

U. S. v. Bethlehem Steel Co., 205 U.S. 105;

Maryland Dredging Co. v. U. S., 241 U.S. 184;

City of Redding v. U. S. F. & G. Co. (E.s.P.) 19 F. Supp. 350;

Bankers Surety Co. v. Elkhorn R. Drainage Dist. (8 Cir.) 214 F. 342.

34 A.L.R. 1345, et seq. This provision is valid.

In Six Companies v. Joint Highway District No. 13, 110 F. (2d) 621 (9th Cir.) the court allowed recovery under a clause for liquidated damages quite similar to the article of the contract here involved. Judge Healy speaking for the court saying:

> "Although a municipality, in its corporate capacity, may suffer no damage from delay in the completion of a public improvement, it may validly contract for liquidated damages for delay in contemplation of the inconvenience and loss which will flow to its inhabitants for whose benefit the improvement is intended and at whose cost it is built. Such is the rule applied in the cases generally." (Citing the above cases)

While this case was reversed on certiorari on

the sole ground that the laws of the State of California provided that a stipulation in a construction contract for liquidated damages in case of delay in completion was inapplicable after abandonment of the work.

Six Companies of California v. Joint Highway Dist. No. 13, 311 U.S. 180 (rehearing denied 311 U.S. 730), such reversal does not affect the force of the authorities cited and relied upon by this court on the particular point with which we are dealing. The State of Washington does not have a law comparable to that of California considered in that case.

As applied to construction contracts of a public nature there is an instructive note in 34 A.L.R. p. 1343, in which is cited the case of *Bethlehem Steel Co.*, supra. The author says: (p. 1343)

> "The principal point discussed in *Elliott Mach. Co. v. United States* (1908), 43 Ct. Cl. (Feb.) 232, supra, where recovery was permitted on a stipulation in the contract for the construction of a scow, providing for the payment of a specified amount for each day's delay in the completion thereof as damages which the contractee suffered as a consequence of the delay, notwithstanding that, because of conditions arising after the making of the contract, no actual damages were suffered as a consequence of the delay, was whether the stipulation was in fact one for liquidated damages or for a penalty, the conclusion on this point being that the language sufficiently indicated that the parties intended to liquidate

> the damages in advance, and that the subject matter was proper to liquidate. No question was raised that the amount stipulated was recoverable regardless of whether actual damages were suffered, if the contract was, in fact, one for liquidated damages."

Article 9 of the contract here involved, in its language is taken from Sec. 1223 Appendix to Title 41, U.S.C.A. and will be found at p. 592 Public Contracts, of the paper covered volume (T. 40 and 41), 1951 supplementary pamphlet.

By the provisions of Section 269, Title 40, U.S.C.A. it is expressly provided that stipulations for "liquidated damages" in public contracts shall be "conclusive and binding upon all parties". That section reads:

> "In all contracts entered into with the United States for the construction or repair of any public building or public work under the control of the Federal Works Agency, a stipulation shall be inserted for liquidated damages for delay * * * and in all suits commenced on any such contracts or on any bond given in connection therewith, it shall not be necessary for the United States, whether, plaintiff or defendant, to prove actual or specific damages sustained by the Government by reason of delays, but such stipulation for liquidated damages shall be conclusive and binding upon all parties."

Judge Yankwich, sitting in the Southern Division of the Western District of Washington had oc-

casion to pass on this section in connection with "liquidated damages" for delay in the construction of the post office building at Grant's Pass, Oregon, in the case of *Consolidated Engineering Co., Inc. v. United States*, 35 F. Supp. 980, where he said:

> "The contract provided for the completion of the building within three hundred days after the date of the notice to proceed. There was a delay of seventy days. The contract and specifications specifically provided for liquidated damages in the sum of forty-five dollars for each calendar day of delay. Liquidated damages of this character, recoverable *independent of proof* of damages, are given statutory recognition in the law of public contracts. 40 U.S.C.A. 269.
>
> "The Courts have also recognized them when embodied in public contracts without any direct sanction of law. *United States v. Bethlehem Steel Co.*, 1907, 205 U.S. 105, 119, 27 S.Ct. 450, 51 L.Ed. 731; *Six Companies v. Joint Highway Dist. No. 13*, 9 Cir. 1940, 110 F. (2d) 620, 625. Where the intention of the parties is clear, the application of the penalty will be sustained. * * *"

Neither the Department of Commerce nor the Civil Aeronautics Administration was listed by Duby as a creditor arising out of this contract.

The bankruptcy petition was filed June 28, 1945, and the adjudication was made on June 30, 1945, (Ex. 11 and 7) although Duby knew as early as January 16, 1945, (Ex. 13) that the United States would claim "liquidated damages" for delay at the

rate of $20.00 per day, he did not list plaintiff or the Department as a creditor in the schedule of creditors, and there is no showing here that either the Department of Commerce, the Civil Aeronautics Administration or the plaintiff had any notice or knowledge whatever of the pendency of the bankruptcy proceedings to bring them or either of them within the provisions of the Bankruptcy Act (Sec. 35, Title 11) dealing with discharge.

That part of Section 35 here involved provides that a discharge in bankruptcy shall release a bankrupt from all of his provable debts *except* such as " * * * *have not been duly scheduled in time for proof and allowance, with the name of the creditor * * * unless such creditor had notice or actual knowledge of the proceedings in bankruptcy.*"

We are not entirely without authority for the proposition that the burden of proof is upon the appellee to show that we "had notice or actual knowledge of the proceedings in bankruptcy" so as to bring us within the exception of the quoted section of the Bankruptcy Act because in the early case of *Hill et al v. Smith*, 260 U.S. 592, the late Mr. Justice Holmes, speaking for the court in connection with this very section said:

> "By the very form of the law the debtor is discharged subject to an exception, and one who would bring himself within the exception must offer evidence to do so. *Kreittein v. Ferger*, 238 U.S. 21, 26. *McKelvey v. United States*, 253. But there is an exception to the exception 'unless the creditor had notice' and by the same principle if the debtor would get the benefit of that he must offer evidence to show his right. We agree with the Court below that justice and the purpose of the Section justify the technical rule that if a debtor would avoid the effect of his omission of a creditor's name from his schedules he *must prove the facts upon which he relies.*"

The record in this case is absolutely barren of any proof of notice or knowledge on the part of appellant of the pendency of the bankruptcy proceedings while the bankruptcy file (Ex. 11) clearly shows that the bankrupt did not list this claim.

The defenses interposed by the appellee Surety Continental Casualty Company and the burden of the authorities they will undoubtedly rely upon is that this $20.00 per day is a penalty and therefore dischargeable in bankruptcy, but the authorities herein cited from this court as well as from the United States Supreme Court are to the contrary.

Appellee takes the position that it was released from its obligations under the performance bond by the acts of the Government. To this we can only refer again to the terms of the agreement between

the parties contained in Article 9 (Ex. 3) to which appellee Surety is a party.

There is no place in this case for invoking the doctrine of estoppel. It is not pleaded and is therefore not available to appellee even if the doctrine could be asserted against the Government, which we contend it cannot.

CONCLUSION

From the foregoing it is respectfully submitted that the district court erred in its finding with respect to notice to the Surety and its conclusion of law based upon that finding and the judgment should be reversed with directions to enter judgment against the appellee Surety in the amount of $1680.18.

Respectfully submitted,

J. CHARLES DENNIS
United States Attorney
JOHN E. BELCHER
Assistant United States Attorney
For Appellant